(1)

Supreme Court, U.S.
FILED

97 684 AUG 25 1997

OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

RAYFORD PATCH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BRUCE FEDER
Counsel of Record
Feder Law Office, P.A.
2525 E. Arizona Biltmore Circle
Phoenix, Arizona 85016
(602) 257-0137
Attorney for Petitioner

57pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in finding that state law enforcement officers have law enforcement authority over Native American members of an Indian Reservation for traffic violations occurring exclusively within that reservation.

2. Whether the Court of Appeals erred in denying *de novo* review of a Motion to Suppress Evidence, and in summarily affirming this Motion premised on a state law enforcement officers' authority to detain/arrest a Native American member of an Indian Reservation for a traffic offense occurring on that Reservation while said member stood in the doorway of his residence on his Reservation.

3. Whether the Court of Appeals erred in summarily affirming the assault conviction notwithstanding the Petitioner's uncontested good faith mistake defense that his actions were based on his founded belief that a State law enforcement officer had no authority to detain/arrest him.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

A. FACTUAL BACKGROUND OF THE 1994 JUDGMENT 4

B. PROCEDURAL HISTORY 13

REASONS FOR GRANTING THE WRIT 14

I. THE COURT OF APPEALS ERRED IN FINDING THAT STATE LAW ENFORCEMENT OFFICERS HAVE LAW ENFORCEMENT AUTHORITY OVER NATIVE AMERICAN MEMBERS OF AN INDIAN RESERVATION FOR TRAFFIC VIOLATIONS OCCURRING EXCLUSIVELY WITHIN THAT RESERVATION 14

II. THE COURT OF APPEALS ERRED IN DENYING *DE NOVO* REVIEW OF THE MOTION TO SUPPRESS EVIDENCE AND IN SUMMARILY AFFIRMING THIS MOTION PREMISED ON A STATE LAW ENFORCEMENT OFFICERS' AUTHORITY TO DETAIN/ARREST A NATIVE AMERICAN MEMBER OF AN INDIAN RESERVATION FOR A TRAFFIC OFFENSE WHILE SAID MEMBER STOOD IN THE DOORWAY OF HIS RESIDENCE ON HIS RESERVATION 20

III. THE COURT OF APPEALS ERRED IN SUMMARILY AFFIRMING THE ASSAULT CONVICTION NOTWITHSTANDING THE PETITIONER'S UNCONTESTED GOOD FAITH MISTAKE DEFENSE 22

CONCLUSION 23

CERTIFICATE OF MAILING - PROOF OF SERVICE 24

TABLE OF AUTHORITIES

Cases Cited:

Application of Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1958) 16

Belknap Indian Community v. Mazurek, 43 F.3d 428 (9th Cir. 1994) 16

Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604 (1991) 23

Colorado River Indian Tribe v. Town of Parker, 705 F.Supp. 473 (D.Ariz. 1989) 16

Confederated Tribes of Colville Reservation v. Washington, 938 F.2d 146 (9th Cir. 1991), *cert.denied*, 503 U.S. 997 (1992) 16

Davis v. Director, North Dakota Department of Transportation, 467 N.W.2d 420 (N.D. 1991) 17

Givens v. Housewright, 786 F.2d 1378 (9th Cir. 1986) 20

Horton v. California, 496 U.S. 128, 136 (1990) 22

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 177-79 (1973) 16

Montana v. United States, 450 U.S. 544, 565-566, 101 S.Ct. 1245 (1981) 15

Ornelas v. United States, ___ U.S. ___, 116 S.Ct. 1657, 134 L. Ed.2d 911 (1996) 20

Ratzlaf v. United States, 510 U.S. 135, 114 S.Ct. 655 (1994) 23

Ross v. Neff, 905 F.2d 1349 (10th Cir. 1990) 17, 21

State v. Spotted Horse, 462 N.W.2d 463 (S.Dak. 1990) 17, 20

State v. Zaman, 927 P.2d 347 (Ariz. App. 1996) 15

Sychuan Band of Mission Indians v. Roache, 788 F.Supp. 1498 (S.D.Calif. 1992), *aff'd*. 54 F.3rd 535 (9th Cir. 1994), *cert.denied*, 133 L.Ed.2d 203 (1996) 17

Tohono O'Odham Nation v. Schwartz, 837 F.2d 1024, 1029 (D.Ariz. 1993) . 15

United States v. Albertini, 830 F.2d 985 (9th Cir. 1987) 23

United States v. Baker, 894 F.2d 1144 (10th Cir. 1990) 17

United States v. Kagama, 118 U.S. 374, 384 (1885) 14

United States v. Merriweather, 777 F.2d 503 (9th Cir. 1985) 20

United States v. Rayford Hanson Patch, ___ F.3d ___, W.L. 274747 (9th Cir. 1997) 1

United States v. Span, 970 F.2d 573 (9th Cir. 1992), *cert. denied*, 507 U.S. 921 (1993) 22

Wauneka v. Campbell, 22 Ariz.App. 287, 526 P.2d 1085 (App. 1974) . . . 16

Williams v. Lee, 358 U.S. 217 (1959). 16

Statutes Cited:

18 U.S.C. §113(e) 13

18 U.S.C. §1151 3

18 U.S.C. §1152 13

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 14

United States Constitution Cited:

Fourth Amendment 3, 13, 20

Rules Cited:

Rule 58(g)(2)(B), Federal Rules of Criminal Procedure 14

Other Authority Cited:

5 Am.Jur.2d, Arrest, §51 18

Fresh Pursuit onto Native American Reservations: State's Rights to Pursue Savage Hostile Indian Marauders Across the Border, an Analysis of the Limits of State Intrusion into Tribal Sovereignty, 59 *University of Colorado Law Review*, 191, 248 (1988) 19

Public Law 280 15

APPENDIX

Appendix A--Opinion of the United States Court of Appeals for the Ninth Circuit Filed May 27, 1997 . . A

Appendix B--Order of the United States District Court for the District of Arizona Filed April 17, 1996 . . . . . B

Appendix C--Judgment of the United States District Court for the District of Arizona Filed July 23, 1994 C

The Petitioner, Rayford Patch, a Native American member of the Colorado River Tribe, and a member of the Tribal Council of the Colorado River Indian Reservation, respectfully requests that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Ninth Circuit in this Case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at *United States of America v. Rayford Hanson Patch*, ___ F.3d ___, 1997, W.L. 274747 (9th Cir. 1997) (Appendix A). The Opinion of the District Court in *United States v. Patch*, CR95-00031-RCB is unpublished. (Appendix B)

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") was entered on May 27, 1997. No Petition for Rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution reads:

> The rights of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. §1151 provides that:

> Except as otherwise provided in §1154 and 1156 of this title, the term "Indian Country", as used in this chapter, means (a) all land within the limits of any Indian Reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the Reservation (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights

of way running through the same.

STATEMENT OF THE CASE

A. Factual Background of the 1994 Judgment

The fundamental question in this case is whether, contrary to legal precedent and the treaties between the United States and its internal Indian Nations, the United States Court of Appeals for the Ninth Circuit (hereinafter "Court of Appeals") properly endowed law enforcement authority to a state law enforcement officer over a Native American member of an Indian Reservation in regard to an alleged traffic offense where said offense, the alleged law enforcement pursuit, and the detention and arrest occurred exclusively within the confines of that Indian Reservation. To appreciate the significance of the issues presented by the case, it is essential to consider the factual and procedural background.

Although the crime of conviction is insignificant in severity, it represents a substantial attack on the sovereignty of Indian Nations in what has been a history of attempted encroachments by the states' law enforcement communities. Specifically, the Petitioner, Rayford Patch (hereinafter "Mr. Patch") was a lifelong member of his Tribe and of the Colorado River Reservation, had served as a tribal judge and lawyer, and was a present day Tribal Council member at the time of the underlying offense. On that basis, Mr. Patch had a legitimate and

reasonable belief that he was not subject to the law enforcement authority of state law enforcement officers within the confines of his Reservation for any civil or criminal traffic infraction.

On May 28, 1994, the date of this incident, the Colorado River Tribe (hereinafter "the Tribe") had not entered into any agreement with La Paz County, Arizona or the City of Parker (a town located exclusively within the boundaries of the Tribe's Reservation) that would allow state entities law enforcement officers to arrest, detain or investigate a member of the Tribe for an alleged crime occurring on the Reservation (ER pp 36-39, 59, 71, 228, 342-346).[1] The Colorado River Indian Tribal Council, of which Mr. Patch was a member, had the exclusive authority to give permission to non-Tribal law enforcement officers to commit any law enforcement duties on the Reservation against Native American members (ER p 229). There was no operational mutual assistance agreement between the Tribe and La Paz County as of May 28, 1994 (ER pp 229-230). The Tribe had communicated to La Paz County that their county sheriffs had no jurisdiction or authority to investigate, arrest, or detain Tribal members on the Reservation on more than one occasion prior to the date of Mr. Patch's arrest (ER pp 230-231, 290-292, 296-297, 312, 333-334, 336-340, 342-346). The state law enforcement authorities had acknowledged their lack

---

[1] "ER" refers to the documents in the Excerpt of Record filed contemporaneously with the appeal before the Ninth Circuit Court of Appeals.

of authority and directed their officers not to detain or arrest Native Americans on the Reservation (ER p 2). State law enforcement officers had been permitted to patrol State Route 95, an Arizona state highway which crosses through the Colorado River Reservation, exclusively to handle criminal matters involving non-Indians or crimes by non-Indians on Indian land (ER pp 241-242). These exclusionary actions were taken by the Tribe, in part, because in the 1980s there had been numerous instances where City of Parker police killed or injured Tribal members during "arrests" for alleged misdemeanor offenses (ER pp 40-41, 242-243).

The above-described policies and understandings, as contained in the uncontested testimony of the chairperson of the Tribal Council, the Tribal police chief (Mr. Patch's brother), and various Tribal police officers, were explicitly understood and shared by Mr. Patch (ER p 332-346). Mr. Patch testified that the Tribal Council would never authorize the alleged victim in this case, La Paz County Deputy Sheriff Michael Schwab (hereinafter "Mr. Schwab"), to have law enforcement authority on the Reservation even if an agreement between his Tribe and La Paz County was ever reached because of complaints made known to him by Tribal members that Mr. Schwab was antagonistic to Native Americans (ER pp 347-348).

Before physically assaulting and arresting Mr. Patch on May 28, 1994, Mr. Schwab should have been well acquainted with Mr. Patch. Specifically, Mr. Schwab also had lived on the Reservation a

majority of his life (ER p 136). Mr. Schwab's father had been a Bureau of Indian Affairs director on this same Reservation (ER p 180). Mr. Patch had grown up with Mr. Schwab's family, and had attended school with Mr. Schwab's older brother, Ken Schwab (ER p 340-341). Mr. Patch had been to the Schwab residence when he was a child growing up and had been around Mr. Schwab when socializing with his older brother (ER p 341).

As adults, Mr. Patch had seen Mr. Schwab around the Town of Parker on a variety of occasions, not only because of his childhood history, but because Parker, the only town of substance in La Paz County, consists of approximately 3,000 persons and approximately five to six restaurants (ER pp 341-342). He also knew Mr. Schwab when Mr. Schwab served as a police officer for the Colorado River Indian Tribal Police (hereinafter "CRIT") at the same time Mr. Patch was a Tribal judge (ER pp 341-342). Mr. Schwab acknowledged his employment as a Colorado River Indian Tribal Detention Officer in 1982 and 1983, but denied that he knew Mr. Patch as a Tribal judge (ER pp 135, 181). Mr. Schwab acknowledged that he knew Mr. Patch's brother, Harry Patch, the Colorado River Tribal Chief of Police, as of May, 1994, Mr. Patch's sister, Mara Patch, who was a fellow Tribal Police Officer with him when he worked for the Colorado River Tribal Police, and Mr. Patch's other brother who was also a Tribal Council member at the time of the subject arrest (ER p 180). Notwithstanding this long history of contact in a small, rural county in a small, isolated town, Mr. Schwab denied

that he had ever "come across" Mr. Patch prior to the evening of May 28, 1994 (ER p 135). However, Mr. Schwab admitted he wasn't paying attention to whether he was attempting to detain a Native American when confronting Mr. Patch (ER pp 169-171, 173-174). The significance of this disavowal relates to the findings of fact that Mr. Schwab could investigate, detain, and arrest Mr. Patch as long as Mr. Schwab was unaware of Mr. Patch's Tribal/Native American status.[2]

Against this backdrop, Mr. Schwab and another La Paz County Deputy Sheriff, Miguel Quinones, were patrolling State Route 95, within the confines of the Tribal Reservation, on May 28, 1994 (ER p 75). This stretch of road, the entire Town of Parker, and the home of Mr. Patch's sister, Mara Patch, located in Parker at 813 Chemehuevi, are completely within the confines of the Reservation. While on this patrol, these officers claimed that Mr. Patch's vehicle approached them quickly, and followed them too closely until they pulled over onto the shoulder of the highway (ER pp 76, 137-138). Mr. Schwab testified he intended only to stop Mr. Patch to check his sobriety and warn him not to drive too closely to other vehicles (ER p 138). After Mr. Schwab's vehicle pulled onto the highway shoulder, it returned to the

---

[2] This is the partial basis upon which the Trial Court, the District Court, and the three judge Court of Appeals panel have found that Mr. Schwab did not know he was physically confronting, detaining and arresting a Native American.

traveled portion of the highway behind Mr. Patch's car once the Patch car had passed. It is disputed whether or not the emergency lights of the Schwab police vehicle were activated at this time or at a later time (ER pp 137-139, 358-360). Mr. Patch denies speeding or violating any traffic laws prior to Mr. Schwab's emergency light activation (ER pp 357-358). However, it is not disputed that at some point, Mr. Patch, accompanied by his minor daughter, knew he was being followed by a La Paz County Sheriff's vehicle with activated emergency lights on Tribal land (ER pp 137-139, 358-359).

During the time these vehicles were traveling from their initial contact point on State Highway 95 into the Town of Parker, and then to the residence of Mara Patch located at 813 Chemehuevi, Mr. Schwab acknowledged that none of the traffic infractions/offenses he suspected Mr. Patch of committing would authorize him to arrest Mr. Patch once he became aware Mr. Patch was a Tribal member (ER p 182). During the time Mr. Schwab's vehicle was following Mr. Patch's vehicle before reaching 813 Chemehuevi, Mr. Schwab used his police radio to dispatch messages concerning his activities. These dispatches indicated Mr. Schwab was following Mr. Patch's car for a possible traffic infraction (versus the suspicious activity claimed by Mr. Schwab in his trial testimony), and, more significantly, he was following "possible Tribal members" (ER pp 306-312). In the same transmissions, Mr. Schwab additionally requested that CRIT be notified.

Mr. Patch pulled his vehicle into the driveway area of his sister Mara Patch's residence at 813 Chemehuevi and Mr. Schwab pulled his vehicle directly behind it. Mr. Patch and his daughter then left their car and walked toward the front door of the home. Mr. Schwab ordered that Mr. Patch stop, that he wanted Mr. Patch to talk to him, and that Mr. Patch should come back to him. Mr. Patch stated in response to these orders that the police officers were to get off the property and that Mr. Patch did not have to talk to them (References throughout the testimony of witnesses Quinones, Schwab, Evans and Patch). Mr. Schwab walked after Mr. Patch and his daughter and met him face-to-face in the porch/front door area of this home, which was illuminated with an outside porch light and light coming from the front door which had been opened by Mr. Patch or his daughter (ER pp 103-108). Illumination also came from the headlights of the various police vehicles (Schwab and others now on the scene) (ER pp 355-356). Mr. Patch had unlocked the door with his house keys previous to this meeting (ER p 367).

At the time of this incident, Mr. Patch weighed 340 pounds and had long, dark straight hair; his daughter weighed approximately 220-230 pounds and also had long, dark straight hair (ER p 350). Although it is disputed whether Mr. Patch first entered the home, walked into his living room and then came back to the door where he was grabbed by Mr. Schwab, or whether Mr. Schwab grabbed Mr. Patch as he was in the doorway before he went to the living room table and came back, it appears that Mr. Patch was standing,

with the front door open, in the doorway or directly in front of it when Mr. Schwab initiated the physical contact by grabbing Mr. Patch by his biceps (ER pp 149, 177-178, 367-368). It is also undisputed that Mr. Patch, at some point thereafter, pushed Mr. Schwab away from him. Immediately subsequent to this, Mr. Schwab, Mr. Quinones, and other La Paz Sheriff Deputies and City of Parker police officers tackled Mr. Patch and handcuffed him. Notwithstanding Mr. Schwab's denials of knowledge that he was following, confronting and detaining a Tribal member, he admitted in his testimony that he was detaining Mr. Patch for the CRIT police (ER p 150). Mr. Schwab also admitted that Mr. Patch would not have felt free to leave and would feel like he was in custody when Mr. Schwab initially grabbed him prior to the alleged assaultive behavior of Mr. Patch (ER pp 179-180).

Immediately after Mr. Patch was tackled by these state law enforcement officers, Ray Evans, a CRIT police officer, arrived and took control of Mr. Patch. Mr. Evans had grown up on the Reservation and immediately recognized Mr. Patch as a member of the Tribe (ER pp 192-193). Mr. Evans indicated that it was "common knowledge" that Mr. Patch was a member of the Tribe and on the Tribal Council (ER p 193). Before taking Mr. Patch to the CRIT police station, Mr. Evans interviewed Mr. Schwab to ascertain what had occurred and what the basis of the arrest of Mr. Patch had been. Mr. Schwab told Mr. Evans that he had observed an "Indian male subject exit the vehicle from the driver's side when it parked at 813 Chemehuevi." Mr. Evans had

a clear memory of Mr. Schwab telling him that he knew it was an Indian male at the time that the Indian male first stepped from the vehicle when it parked at the subject residence (ER pp 209-211, 217-218). Mr. Evans indicated the CRIT police station was two to three minutes away from the crime scene (ER pp 212-213).

After Mr. Evans took custody of Mr. Patch, Mr. Patch expressed his understanding that "You know I don't have to stop for the sheriff. I don't have to stop for the County." (ER p 203). Mr. Patch also indicated to Mr. Evans that he had pushed Mr. Schwab because "he had to get him away from the house" (ER p 205).

The above-referenced statements made immediately subsequent to this confrontation with Mr. Schwab are consistent with Mr. Patch's trial testimony that he, after assuring that he was not violating the speed limit so that the County Sheriffs could not claim he was trying to get away (ER pp 360-361), did not pull over because he knew La Paz County Sheriff had no jurisdiction over him, and that he was concerned for his and his 16-year old daughter's safety based on the history of non-Tribal police officers' violence generally toward Tribal members, and specifically toward Mr. Patch's relatives in the 1980s (ER pp 361-362). It was Mr. Patch's belief that he was not required to talk to Sheriff's officers (ER pp 372-373). When Mr. Schwab was on his property, and did not leave, notwithstanding Mr. Patch's request, and when Mr. Schwab grabbed him as he stood in his doorway, Mr. Patch believed Mr. Schwab was violating the

Colorado River Tribal Law and Order Code for trespass and assault (ER pp 373-374).

B. Procedural History

On July 25, 1994, a Criminal Information was issued by the United States against Mr. Patch alleging that he had committed a simple assault on La Paz County Deputy Sheriff Michael Schwab pursuant to 18 U.S.C. §113(e) and §1152 (ER p 1) (Appendix C).

During the course of these proceedings, Mr. Patch filed a Motion to Suppress Evidence asserting that La Paz County Sheriff's officers had no law enforcement authority on the Reservation to investigate, detain, or arrest Native Americans for crimes (or civil traffic offenses) committed on such Reservation, and, as a result, that the government's witnesses' observations of the assaultive behavior and alleged statements made by the parties and witnesses should not be admissible because it violated the Fourth Amendment (MCR 18 and 28).[3] The Magistrate Judge denied the Motion to Suppress Evidence (ER pages 275-276),

---

[3] "MCR" refers to the documents in the Magistrate's Court Record before whom the suppression motion and trial occurred. It was agreed by the Court and the parties that most of the evidentiary hearing testimony on the motion to suppress evidence which occurred immediately previous to the trial would also be considered as trial testimony, with the exception of Eric Deysie and Randy Stewart, whose testimony was for the suppression motion only.

asserting that the County law enforcement officer could detain Mr. Patch because he was in "hot pursuit," and that suppression motions cannot suppress observations and statements, likening the request of Mr. Patch to "suppress[ing] the prosecution." The Magistrate Judge thereafter found Mr. Patch guilty of assault (Appendix C).

On appeal from the Magistrate Judge pursuant to Rule 58(g)(2)(B), Federal Rules of Criminal Procedure, the United States District Court affirmed the conviction and judgment of Mr. Patch on April 16, 1996 (ER pp 411-427) (Appendix B). Mr. Patch appealed the District Court's affirmance to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. §1291. On May 27, 1997, the Court of Appeals affirmed the District Court (See Appendix A).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN FINDING THAT STATE LAW ENFORCEMENT OFFICERS HAVE LAW ENFORCEMENT AUTHORITY OVER NATIVE AMERICAN MEMBERS OF AN INDIAN RESERVATION FOR TRAFFIC VIOLATIONS OCCURRING EXCLUSIVELY WITHIN THAT RESERVATION.

A history of distrust and dislike of state law enforcement officers has existed among Tribal members for as long as the federal government has employed the Tribal Reservation system. As stated in *United States v. Kagama*, 118 U.S. 374, 384 (1885):

> . . . these Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the states, and receive from them no protection.. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. (emphasis included)

Against this historic backdrop, the efforts by states to extend the reach of their jurisdiction into Indian country have been frequent, but generally unsuccessful, especially where the state's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." *Montana v. United States*, 450 U.S. 544, 565-566, 101 S.Ct. 1245 (1981). In the present case, the state's attempted intrusion directly threatens the integrity of the Colorado River Tribe's sovereignty and application of federal law, especially given this Tribe's specific and clear communications to state law enforcement officers that they could not attempt enforcement of law on their reservation against Native American persons.

Arizona is somewhat unique in that, unlike other states, it never amended its Constitution to allow it to undertake jurisdiction over its Reservations under Public Law 280. Arizona decided not to take such action. *State v. Zaman*, 927 P.2d 347 (Ariz.App. 1996); *Tohono O'Odham*

Nation v. Schwartz, 837 F.2d 1024, 1029 (D.Ariz. 1993); *Belknap Indian Community v. Mazurek*, 43 F.3d 428 (9th Cir. 1994); *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991), *cert.denied*, 503 U.S. 997 (1992). Absent such implementation, Arizona (or any other state) has little or no jurisdiction over Native Americans on Indian Reservations. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 177-79 (1973), *Williams v. Lee*, 358 U.S. 217 (1959). Arizona appellate courts have made it clear that state law enforcement officers have no jurisdiction over the enforcement of traffic laws on Indian Reservations. *Application of Denetclaw*, 83 Ariz. 299, 320 P.2d 697 (1958) (no Arizona state jurisdiction over traffic offenses committed by Native American Tribal members on their Reservation); *Wauneka v. Campbell*, 22 Ariz.App. 287, 526 P.2d 1085 (App. 1974) (notwithstanding Navaho Nation's requirement of Tribal members to obtain Arizona driver's licenses to drive on the Reservation, Arizona Department of Motor Vehicles has no administrative authority to suspend or revoke a Tribal member's license). State law enforcement officers in the area of the Colorado River Tribe would be specifically on notice of their lack of authority. *See, Colorado River Indian Tribe v. Town of Parker*, 705 F.Supp. 473 (D.Ariz. 1989).

Notwithstanding this authority, the Court of Appeals appears to base its affirmance on the rationale of "hot pursuit." However, this rationale has also been uniformly rejected in similar circumstances. In order for the "hot pursuit" doctrine to be applicable, the

pursuing officer must have authority to engage in the pursuit over the individual pursued and the area of pursuit. In the present case, Mr. Schwab had none. *See*, *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990) (exercise of authority by a state law enforcement officer over a Tribal member on a pursuit from state land onto an Indian reservation was actionable as a civil rights violation); *United States v. Baker*, 894 F.2d 1144 (10th Cir. 1990) (evidence seized on basis of state-issued search warrant executed on a Reservation suppressed where the state had no jurisdiction over the Reservation to enforce its laws); *Sychuan Band of Mission Indians v. Roache*, 788 F.Supp. 1498 (S.D.Calif. 1992), *aff'd.* 54 F.3rd 535 (9th Cir. 1994), *cert.denied,* 133 L.Ed.2d 203 (1996) (search warrants executed on Reservation unauthorized as beyond the jurisdiction of California); *Davis v. Director, North Dakota Department of Transportation*, 467 N.W.2d 420 (N.D. 1991) (breathalyzer result taken by Tribal member on Tribal land at state law enforcement officer's request excludable on the basis that the officer lacked authority to administer the test); *State v. Spotted Horse*, 462 N.W.2d 463 (S.Dak. 1990) (notwithstanding occurrence of DUI offense off Indian Reservation and police pursuit onto Indian Reservation, state police had no authority on Reservation, and state fresh pursuit statute inapplicable because of state law enforcement officer's lack of jurisdiction on Reservation--suppression of detention and arrest of the defendant

including the breathalyzer results and the police observations).[4]

The use of a talismanic "hot pursuit" excuse to bootstrap state law enforcement officers with authority while they travel within Indian Reservations would facilitate the evils feared by legal commentators regarding the states' attempted intrusion into Native American sovereignty:

> . . . Just as a state may not authorize its municipal law enforcement officers to engage in fresh pursuit into another state, because the authorizing state has no criminal jurisdiction in the bordering state, so a state cannot authorize its officers to cross the jurisdictional boundaries of the Reservation. Moreover, the intrastate doctrine of fresh pursuit authorizes officers to arrest not only for the original violation, but also for offenses that occurred during the pursuit, even if the later offenses take place outside the officer's territorial jurisdiction. Application of this doctrine to Native Reservations would lead to the exercise of unauthorized

---

[4] The jurisdiction of law enforcement officers interstate or other interjurisdictions "hot pursuit" of suspected misdemeanor offenders has been viewed as stopping at the state line. 5 Am.Jur.2d, Arrest, §51.

> state criminal jurisdiction within the Reservation boundaries. A municipal officer pursuing a suspect onto the Reservation would be empowered to arrest for a crime occurring on the Reservation during the pursuit, even though, under the circumstances, the officer would have no jurisdiction to arrest for on-Reservation crimes.
>
> Use of the intrastate doctrine to justify fresh pursuit arrest on the Reservation, therefore, raises the initial pungent aroma of the state camel under the sovereign tribal Tipi. Reliance on this model of fresh pursuit would permit the state to exercise an unwarranted degree of criminal jurisdiction within Reservation boundaries, thereby increasing the likelihood of further domestic encroachments on Tribal sovereignty.

Fresh Pursuit onto Native American Reservations: State's Rights to Pursue Savage Hostile Indian Marauders Across the Border, an Analysis of the Limits of State Intrusion into Tribal Sovereignty, 59 *University of Colorado Law Review*, 191, 248 (1988).

The "hot pursuit" doctrine should not be allowed to legalize the actions of Mr. Schwab in this case. Mr. Schwab's actions were outside of his jurisdiction

and in violation of the Tribal criminal code.

II.

THE COURT OF APPEALS ERRED IN DENYING *DE NOVO* REVIEW OF THE MOTION TO SUPPRESS EVIDENCE AND IN SUMMARILY AFFIRMING THIS MOTION PREMISED ON A STATE LAW ENFORCEMENT OFFICERS' AUTHORITY TO DETAIN/ARREST A NATIVE AMERICAN MEMBER OF AN INDIAN RESERVATION FOR A TRAFFIC OFFENSE WHILE SAID MEMBER STOOD IN THE DOORWAY OF HIS RESIDENCE ON HIS RESERVATION.

Fourth Amendment probable cause issues are reviewed *de novo*. *See, Ornelas v. United States*, ___ U.S. ___, 116 S.Ct. 1657, 134 L. Ed.2d 911 (1996); *United States v. Merriweather*, 777 F.2d 503 (9th Cir. 1985). Questions of law, including the legal authority of non-Tribal police on an Indian Reservation, are also reviewed *de novo*. *Givens v. Housewright*, 786 F.2d 1378 (9th Cir. 1986).

The Court of Appeals improperly used a "clearly erroneous" standard to affirm the denial of Mr. Patch's Motion to Suppress and accept the "finding" that Mr. Schwab was unaware of Mr. Patch's Native American status. Even assuming this standard was correct, the Court gives no facts to support these assertions, as did neither the Magistrate Judge or the District Court. There were no supporting facts. Initially, the Magistrate found that:

> Moreover, the Court does not find that there is anything

> that occurred that would be subject to suppression under the Constitution, and that all the events, as far as seeing the individual, other than the final identification of him as an Indian, which was really supplied by Raymond Evans, all occurred during the--prior to any touching of Mr. Patch by Officer Schwab, the deputy sheriff, and therefore was properly done. (ER p 32)

It is this "finding" upon which the lower courts rely. It is urged that under this reasoning, no finding can be clearly erroneous, especially given Mr. Schwab's testimony that he was not paying attention to whether he was involved with a Tribal member and/or a Native American.[5] However, on *de novo* review, accepting Mr. Schwab's contention would seem even more ludicrous.

A warrantless arrest executed outside of the arresting officer's jurisdiction is analogous to a warrantless arrest without probable cause. *Ross v. Neff*, 905 F.2d at 1354. Given the uncontested fact of Mr. Patch's status, and the occurrence of all other relevant acts within these Tribal lands, Mr. Schwab had no probable cause because he had no law enforcement jurisdiction over Mr. Patch. *State v. Spotted Horse*,

---

[5] Mr. Schwab testified even if Mr. Patch had stated to him that he was Rayford Patch, a Tribal member, this only would have caused him to further investigate (ER pages 185-187).

462 N.W. 2d at 467. On this basis, the police observations of the alleged commission of traffic offenses, of the statements of Mr. Patch, and of the alleged assault by Mr. Patch, were fruits of their illegal action, and their presence in a location at which they had no legal authority to be. *Horton v. California*, 496 U.S. 128, 136 (1990). Suppression should have been granted. Mr. Schwab's contentions should be negated because he willfully blinded himself in order to testify he was ignorant of who and what Mr. Patch was.

III.

THE COURT OF APPEALS ERRED IN SUMMARILY AFFIRMING THE ASSAULT CONVICTION NOTWITHSTANDING THE PETITIONER'S UNCONTESTED GOOD FAITH MISTAKE DEFENSE.

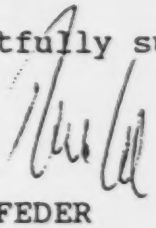
Notwithstanding the Court of Appeals' indication that the law enforcement authority of a state police officer was a matter of first impression, it determined not even to discuss Mr. Patch's argument that he resisted the assault by Mr. Schwab on his good faith belief that Mr. Schwab had no law enforcement authority over him. The District Court relied on *United States v. Span*, 970 F.2d 573 (9th Cir. 1992), *cert.denied*, 507 U.S. 921 (1993), finding Mr. Patch could not resist the assaultive behavior of Mr. Schwab unless Mr. Schwab was engaged in some type of "personal frolic." However, before May 1994, there had never been any appellate case or law which allowed a state law enforcement officer to enforce traffic laws on Native Americans on their own

Reservations. Further, all of Mr. Patch's experience as a Tribal judge and Tribal Council member indicated that Mr. Schwab had no law enforcement authority over him. As such, Mr. Patch relied on the official executive and legislative positions of his Tribe, and his own knowledge that the law, which, as of that date, supported his view that Mr. Schwab had no authority over him and that, under Tribal law, Mr. Schwab was a tres-passer and an assailant. There was uncontested evidence of a good faith mistake defense. *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655 (1994); *Cheek v. United States*, 498 U.S. 192, 111 S.Ct. 604 (1991); *United States v. Albertini*, 830 F.2d 985 (9th Cir. 1987). The affirmances of Mr. Patch's conviction are not only unfounded, but appear to violate the prohibition against *ex post facto* laws.

CONCLUSION

For the reasons stated, Mr. Patch respectfully petitions this Court to grant certiorari.

Respectfully submitted,



BRUCE FEDER
Counsel of Record
Feder Law Office, P.A.
2525 E. Arizona Biltmore Circle
Phoenix, Arizona 85016
(602) 257-0137
Attorneys for Petitioner

CERTIFICATE OF MAILING - PROOF OF SERVICE

BRUCE FEDER, attorney for Petitioner, declares under penalty of perjury that the following is true and correct:

That in accordance with Rule 29.2, Supreme Court Rules, he has properly deposited in a United States Post Office or mailbox, certified, return receipt requested, forty (40) printed copies of this Petition for Writ of Certiorari to be forwarded to the Clerk of the Supreme Court of the United States of America within the period prescribed in Rule 13.1, Supreme Court Rules.

That in accordance with Rule 29.4(a), Supreme Court Rules, three copies of this Petition for Writ of Certiorari have this 15th day of October, 1997, been mailed to Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, DC 20530.

That in accordance with Rule 29.5, Supreme Court Rules, three copies of this Petition for Writ of Certiorari have this 15th day of October, 1997, been hand-delivered to Joan G. Ruffennach, Esq., Assistant United States Attorney, 4000 United States Courthouse, 230 N. First Avenue, Phoenix, Arizona 85025.

EXECUTED this 14th ~~13th~~ day of October, 1997.

FEDER LAW OFFICE, P.A.

Bruce Feder
Attorneys for Petitioner

APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	) No. 96-10203) D.C. No. CR 95-00031-RCB
v.	)
RAYFORD HANSON PATCH, *Defendant-Appellant.*	) **OPINION**

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Argued and Submitted
March 14, 1997 - San Francisco, California

Filed May 27, 1997

Before: Alfred T. Goodwin, Melvin Brunetti, and Ferdinand F. Fernandez, Circuit Judges

Opinion by Judge Goodwin

SUMMARY

Criminal Law and Procedure/Arrest

The court of appeals affirmed a judgment of conviction of the district court. The court held that a state

police officer without authority to arrest a tribal member has authority to stop a reckless driver to determine if he is a tribal member.

Appellant Rayford Patch, a member of the Colorado River Indian Tribe (CRIT), was driving on an Arizona state highway that ran through an Indian reservation. Patch began tailgating Arizona deputy sheriff Michael Schwab, who was patrolling the highway. Schwab let Patch pass, activated his signal, and began pursuit.

Schwab sent a radio message that he was following a traffic violator who "may be" a tribal member. Schwab had authority to arrest non-Indians for traffic violations, but not tribal members.

Patch stopped at his sister's house in Indian country. Schwab pursued Patch onto the porch, where Patch told Schwab to leave. As Schwab grabbed Patch's arm, Patch pushed Schwab. Patch was turned over to tribal police.

A magistrate judge (MJ) convicted Patch of assault based on the push. The district court affirmed. On appeal, Patch contended that the MJ erred in determining that Schwab did not know Patch was a tribal member before he attempted to arrest him, that Schwab lacked authority to stop him, and that Schwab trespassed onto a private porch in Indian country.

[1] The MJ's finding that Schwab did not know that Patch was a tribal member was not clearly erroneous.

[2] Patch's conviction rested on the conclusion that Schwab was acting within his official duties when he grabbed Patch by the arm on the porch.

[3] As a practical matter, without a stop and inquiry, it is impossible for an Arizona officer to tell who is operating an offending vehicle. [4] Police officers may stop a suspect to investigate suspicious circumstances; they may briefly stop a moving automobile to investigate a reasonable suspicion that its occupants are involved in criminal activity; and they may stop suspicious individuals in order to determine their identity.

[5] The attempted stop was invalid. Schwab needed to make only a brief stop to ascertain Patch's identity to determine whether he was a tribal member. [6] Patch's reckless driving satisfied the criminal activity requirement for reasonable suspicion.

[7] Under the doctrine of hot pursuit, a police officer who observes a traffic violation within his jurisdiction may pursue the offender into Indian country to make the arrest. Schwab was justified in following Patch to a place where he could effect a stop, in this case a private porch of a residence in Indian country.

COUNSEL

Bruce Feder, Phoenix, Arizona, for the defendant-appellant.

Joan G. Ruffennach, Assistant United States Attorney, Phoenix, Arizona, for the plaintiff-appellee.

OPINION

GOODWIN, Circuit Judge:

Rayford Patch, a member of the Colorado River Indian Tribe (herein CRIT), appeals his conviction and fine for simple assault imposed by the United States Magistrate Judge and affirmed by the district court. This case presents a question of first impression in this circuit. Patch argues that the Michael Schwab, the assault victim and a La Paz County deputy sheriff, was trespassing on the porch of a private home within the CRIT reservation when Patch pushed him. The government contends that the county officer was properly executing his official duty when Patch tried to push him off the porch. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the judgment.

FACTS

We begin with certain agreed facts: All material acts, including the alleged traffic violation, took place in Indian country.[1] Deputy Schwab and Detention

---

[1] "The term 'Indian country' . . . means (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b)

Officer Miquel Quinones were patrolling State Highway 95 in a marked sheriff's department car when Patch first came to their attention. Patch was driving a pickup truck with California plates. Patch approached the sheriff's car from the rear in a manner which Schwab considered "tailgating." Schwab pulled over to let Patch pass, then activated his signal lights and pursued Patch, intending to stop the pickup truck.

During the pursuit, Schwab transmitted a radio message that he was following a traffic violator who "may be" a tribal member. Under county procedures, once Schwab knew that Patch was a tribal member, he was supposed to notify the tribal police that a tribal member was a suspected traffic violator within tribal jurisdiction. Schwab later swore in court that he did not know that Patch was a tribal member until after the charged assault was committed. He said he intended to pursue the truck and find out whether the driver was a tribal member, whom Schwab had no authority to arrest, or a non-member, whom he could arrest for traffic violations on a state highway.

---

all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C.A. § 1151.

In fact, Patch was an enrolled member of the CRIT. Further, having once been a tribal judge, Patch possessed just enough knowledge to set up this litigation. Patch testified that he "knew" that the county officer had no authority to stop him on the highway, or anywhere else in Indian country, because he was a tribal member. Accordingly, Patch did not stop, but instead proceeded through the town of Parker, a municipal corporation entirely within the reservation, to the driveway of his sister's house. The sheriff's car followed right behind him.

Patch parked and went up some steps to the porch. Deputy Schwab pursued Patch onto the porch, where Patch told him to "get the hell off my property." Schwab then attempted to detain Patch by grabbing his arm, but Patch pushed Schwab free and went into the house. Patch later returned to the porch where the febrile dialogue continued and turned physical. In the end, two county officers subdued Patch and turned him over to tribal police, who by then were on the scene.

The United States attorney charged this push as an assault, pursuant to 18 U.S.C. § 113(a)(5). The resulting trial before a magistrate judge in district court produced a $150 fine.

ANALYSIS

The district court concluded that Patch's push was an unlawful touching that satisfied the minimum requirements of a simple assault under § 113(a)(5). The court reasoned that Schwab did not

know that Patch was a tribal member and that Schwab had the authority to stop Patch to determine whether he was a tribal member. We review each finding in turn.

1. Did Schwab know that Patch was a tribal member?

[1] Patch argues that the court erred when it found that Deputy Schwab, the assault "victim," did not know that Patch was a tribal member before he attempted to arrest him. The evidence on this point was hotly contested. The magistrate judge found, however, that Schwab did not know until after all the material facts had occurred that Patch was a member of the tribe. The district court left this finding undisturbed. The trial court record reveals no reason to hold that finding to be clearly erroneous. It is therefore accepted as a fact. *See* Fed. R. Crim. P. 23(c); *United States v. Von Willie*, 59 F.3d 922, 925 (9th Cir. 1995).

2. Did Schwab have the authority to stop Patch to determine whether he was a tribal member?

[2] Patch's conviction for assault rests on conclusion of the district court that Schwab was acting within his official duties when he grabbed Patch by the arm on the porch. If he was not, then Patch could have required Schwab to leave and could have used reasonable force to remove him as a trespasser. In finding that Schwab acted within his duties, the court reasoned that Schwab had authority (1) to stop suspects in Indian County to determine his

jurisdiction; and (2) to pursue suspects from Arizona State Highway 95 to a private porch in Indian country.

1. Authority to stop suspects to determine jurisdiction

The section of Arizona State Highway 95 at issue here crosses the CRIT reservation and is subject to overlapping jurisdiction. Offenses committed in Indian country can be subject to federal, state, or tribal jurisdiction depending on the severity of the crime and on whether the offender and/or victim are tribal members. *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990). On this section of road, Arizona police have authority to arrest non-Indians for traffic violations, *See United States v. McBratney*, 104 U.S. 621, 624 (1881); *Draper v. United States*, 164 U.S. 240, 247 (1896), but they do not have authority to arrest tribal members. *See Application of Denetclaw*, 320 P.2d 697, 701 (Ariz. 1958).

[3] As a practical matter, without a stop and inquiry, it is impossible for an Arizona officer to tell who is operating an offending vehicle.[2] In this case, Schwab did not know who was driving the pickup truck. The question

---

[2] In some Arizona counties, state and Indian police departments have cross-deputizing agreement which permit officers of both jurisdictions to enforce traffic laws on state highways crossing tribal lands. La Paz County and the CRIT, however, did not have such an agreement.

therefore is whether Schwab had the authority to stop offending vehicles to determine whether he had authority to arrest.

[4] In *Terry v. Ohio*, 392 U.S. 1 (1967), the Supreme Court held that, consistent with the Fourth Amendment, a police officer could stop a suspect to investigate suspicious circumstances. *Id.* at 22-29. Under the logic of *Terry*, law enforcement agents may briefly stop a moving automobile to investigate a reasonable suspicion that its occupants are involved in criminal activity. *United States v. Hensley*, 469 U.S. 221, 226 (1985); *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975). Also, a police officer may make brief stops of suspicious individuals in order to determine their identity or to obtain more information. *Adams v. Williams*, 407 U.S. 143, 146 (1972).

[5] We hold that the attempted stop in this case was valid as a logical application of *Terry*. Here, Schwab needed to make only a brief stop to ascertain Patch's identity. Such a stop would be a brief, limited detention to ask one question. Like the stop in *Terry*, its purpose would further a legitimate law enforcement objection: to determine whether the suspect was a tribal member. Schwab had the authority under *Terry* to stop vehicles on State Highway 95 to determine his jurisdiction to issue a citation. *Cf. State v. Schmuck*, 121 Wash. 2d 373, 382-83, 850 P.2d 1332, 1337 (1993) (tribal officer may stop a speeding vehicle to see if driver is a tribal member.).

[6] The district court correctly held that Schwab had "reasonable suspicion to detain a motorist." *United States v. Rodriguez*, 976 F.2d 592, 594 (9th Cir. 1992), *amended*, 997 F.2d 1306 (9th Cir. 1993). "Reasonable suspicion" must include "specific, articulable facts" which show "criminal activity." *Id.* Here, Schwab observed Patch's reckless driving which satisfied the "criminal activity" requirement. He unquestionably could have stopped the suspect if he knew the suspect was not a tribal member. He did not know that the suspect was a tribal member, and until he could stop the suspect and ask about tribal membership, the officer could not know whether he had jurisdiction to proceed.[3] Accordingly, we turn to the pursuit.

2. Authority to pursue Patch to a private porch in Indian country

[7] Under the doctrine of hot pursuit, a police officer who observes a traffic violation within his jurisdiction to arrest may pursue the offender into Indian country to make the arrest. *See State of Arizona v. Lupe*, 889 P.2d 4, 7 (Ariz. 1994). *Cf. Brown v. Burns*, 996 F.2d 219, 220 (9th Cir. 1993). Here, Schwab observed Patch tailgating on State Highway 95. Arizona State Highway 95 was within his jurisdiction to arrest, and

---

[3] Patch argues that once it became known that he was a tribal member, the officer's act became retroactively wrongful and turned him into a trespasser. To state that proposition is to refute it.

the tailgating gave him probable cause to arrest. Under the hot pursuit doctrine, Schwab was justified in following Patch to a place where he could effect a stop, in this case the private porch of a residence in Indian country.

We note that this dispute is not controlled by *Welsh v. Wisconsin*, 466 U.S. 740 (1984), where state officers in pursuit of a traffic violator entered the suspect's house, and the entry was held to violate the Fourth Amendment. Here, the pursuit, and ensuing altercation, took place on the porch, a "public" place for Fourth Amendment purposes under *United States v. Santana*, 427 U.S. 38 (1976).[4]

CONCLUSION

The district court held that Schwab was performing his official duties and was lawfully on the porch to attempt to learn, if he could, whether Patch was a tribal member immune from arrest by state officers in Indian country or a nonmember subject to detention long enough to receive a traffic citation. Schwab was not a trespasser. We agree with the district court.

Other points were briefed by the parties, but none requires discussion at this time.

AFFIRMED

---

[4] We recognize that this pursuit did not start outside of Indian country. That, however, did not diminish the officer's right to continue his otherwise valid attempt to question Patch.

APPENDIX B

_X_ FILED ___ LODGED
___ RECEIVED ___ COPY
APR 16 1996
CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA
BY_____DEPUTY

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PHXRCB	)	No. CR 95-31
Plaintiff/Appellee,	)	
vs.	)	**O R D E R**
RAYFORD HANSON PATCH,	)	
Defendant-Appellant.	)	
	)	

The court now considers appellant Rayford Patch's appeal from the judgment, conviction, and sentence imposed upon him by Magistrate Judge Morton Sitver for the alleged violation of a misdemeanor assault statute, 18 U.S.C. §§ 113(a) and 1152. The court has jurisdiction to hear this appeal under Federal Rule of Criminal Procedure 58(g)(2)(B).

I. BACKGROUND

A. Facts

On the evening of May 28, 1994, La Paz County Deputy Sheriff Michael Schwab and Detention Officer Miguel Quinones were on routine patrol on State Route 95. They were traveling north on a portion of Highway 95 located within the boundaries of the Colorado River Indian Tribes Reservation when they first observed

defendant. The officers contend that defendant's vehicle approached their car from behind at a "high rate of speed," eventually coming within two feet of their vehicle. Defendant contends that he stayed at least one car length from Deputy Schwab's vehicle.

Upon seeing defendant come up close behind him, Deputy Schwab immediately pulled to the side of the road and let defendant's truck pass, intending to stop defendant to check his sobriety and warn him not to drive that close to other vehicles. After defendant passed, Deputy Schwab filed in after him, turning on his flashing lights to signal defendant to stop. Defendant initially pulled over to the side of the road as if to stop, but then made a U-turn and traveled south on Highway 95 toward the town of Parker. Deputy Schwab followed him with his flashing lights on. Defendant testified at his trial that he recognized Deputy Schwab's vehicle as a La Paz County Sheriff's Department vehicle and that he knew he was being directed to stop.

While Deputy Schwab followed defendant southbound toward Parker, he informed the dispatcher that he was pursuing a vehicle refusing to stop. Deputy Schwab believes that he also told the dispatcher to notify the Colorado River Indian Tribe ("CRIT") police and Parker police that he was following the vehicle into Parker. At some point, Deputy Schwab also noted that he was following "possible tribal members."

The pursuit ended when defendant pulled into his sister Mara Patch's driveway at 813 Chemehuevi. At that

point, defendant and his daughter got out of their car and walked toward the front door. Deputy Schwab then got out of his car and told defendant to stop, explaining that he needed to talk to him. Defendant responded by telling Deputy Schwab to "get the hell off [his] property." Deputy Schwab followed defendant to the porch area of the home, again directing him to stop. When defendant again ignored this directive, Deputy Schwab grabbed defendant's upper arm. Defendant jerked away from Deputy Schwab and shoved him in the chest. Defendant then went inside the home. Upon returning to the front door, he was pulled out of the doorway, wrestled to the ground, and handcuffed by Deputy Schwab and Detention Officer Quinones. By the time defendant was handcuffed, the CRIT police had arrived, and they took defendant into custody. At that time, the CRIT police identified defendant as a tribal member.

B. Procedure

On July 25, 1994, the U.S. Attorney's Office filed an information against defendant, charging him with one count of simple assault in violation of 18 U.S.C. §§ 113(e) and 1152. Defendant consented to be tried before a Magistrate Judge. Thereafter, defendant filed a motion to suppress all evidence obtained by the La Paz County Sheriff's Deputies and the CRIT police, claiming that the deputies had no authority to stop or arrest him because he was a member of the Colorado River Indian Tribe traveling on the reservation. The Magistrate Judge heard testimony on the motion to suppress on January 10, 1995. The parties agreed

that, in the interests of expediency, the evidentiary hearing testimony would also be considered as trial testimony. The court denied the motion to suppress on January 11, 1995.

The trial testimony concluded on January 11, 1995. The Magistrate Judge found the defendant guilty of simple assault and sentenced him to pay a $140 fine, plus a $10 special assessment.

II. DISCUSSION

A. Standard of Review

Fed. R. Crim. P. 58(g)(2)(D) dictates that the scope of defendant's appeal of the Magistrate Judge's decision is "the same as an appeal from a judgment of a district court to a court of appeals." Accordingly, the court reviews questions of law de novo, Givens v. Housewright, 786 F.2d 1378 (9th Cir. 1986), and findings of fact for abuse of discretion. Pratt v. Rowland, 65 F.3d 802, 805 (9th Cir. 1995). In examining a challenge to the sufficiency of the evidence, the court must determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond reasonable doubt." United States v. Shortt Accountancy Corp., 785 F.2d 1448 (9th Cir. 1985), cert. denied, 478 U.S. 1007 (1995).

B. Whether Deputy Schwab Acted Within his Legal Authority

Offenses committed in Indian Territory can be subject to federal,

state, or tribal jurisdiction depending upon the severity of the crime and whether the offender and/or victim are tribal members.[1] Relevant here, state and local law enforcement officers do not have jurisdiction over tribal members located in Indian territory. 18 U.S. C. § 1152; Ross v. Neff, 905 F.2d 1349, 1352-53 (9th Cir. 1990). Cf. Matter of Denetclaw, 320 P.2d 697, 701 (Ariz. 1958) (state courts have no jurisdiction over "an offense committed by a tribal Indian in 'Indian country.'"). As such, courts have held inadmissible evidence obtained by nontribal officers exercising unlawful

---

[1] In brief, jurisdiction is federal if a crime is committed by an Indian against an Indian or non-Indian when the crime is one enumerated under the Indian Major Crimes Act. Under the Federal Enclaves Act, all crimes committed on the reservation by Indians against non-Indians and crimes committed by non-Indians against Indians are also subject to federal jurisdiction. Notably, the Enclaves Act exempts Indian against Indian crimes not enumerated by the Major Crimes Act. States have jurisdiction over crimes committed on the reservation by non-Indians against non-Indians. Some states, but not Arizona, have additional jurisdiction over crimes committed on the reservation under Public Law 280. Tribes have jurisdiction over misdemeanor or minor crimes committed on the reservation by tribal members. Duro v. Reina, 495 U.S. 676, 680 n.1 (1990); see also Eric B. White, Falling Through the Cracks After Duro v. Reina: A Close Look at a Jurisdictional Failure, 15 U. Puget Sound L. Rev. 229 (1991).

authority over tribal members on the reservation. Neff, 905 P.2d at 1354. Defendant suggests that the Magistrate Judge should have precluded the government's evidence in its entirety because it all emanated from Deputy Schwab's unlawful pursuit of defendant.

The government concedes that defendant is a member of the Colorado River Indian Tribe. It also agrees that all of the relevant events leading up to and including the altercation occurred on the Colorado Indian Reservation. It argues, however, that Deputy Schwab had the authority to stop and detain defendant because defendant was on a public highway and had not yet been identified as a CRIT member.

The court examines first the legal question whether Deputy Schwab had the authority to stop an individual traveling on a public highway in reservation territory when he was unsure whether the person was a tribal member. The court has uncovered no cases directly addressing this question. To be sure, there are cases suggesting that state courts have no authority to hear criminal cases involving alleged crimes by tribal members committed on the reservation. See, e.g., Matter of Denetclaw, 320 P.2d 697, 700 (Ariz. 1958); State v. Webster, 338 N.W.2d 474, 483 (Wis. 1983). Cf. Davis v. Director, North Dakota Dept. of Transp., 467 N.W.2d 420, 423 (N.D. 1991) (holding breathalizer taken by a tribal member on the reservation at state officer's behest excludable because the officer lacked the authority to administer the test); Ross v. Neff, 905 P.2d 1349, 1354 (10th Cir. 1990) (holding

exercise of authority by a state officer over a tribal member on Indian Territory actionable under 42 U.S.C. § 1983). Yet, as the government points out, these cases all address the legality of the state's ultimate exercise of authority over a tribal member, rather than the question here of whether a state officer can, in the first instance, stop and detain an individual to determine jurisdiction.

On that narrower question, the government has directed the court to State v. Schmuck, 850 P.2d 1332 (Wash. 1993). In Schmuck, Officer Bailey, a tribal policeman commissioned by the Suguamish Indian Tribe, pulled the defendant over on a public highway within the confines of the reservation. Officer Bailey inquired whether the defendant was a member of the tribe and whether he had been drinking. The defendant informed Officer Bailey that he was not a tribal member and that he had had a few drinks. Officer Bailey detained defendant for the Washington State Patrol, in the interim submitting the defendant to field sobriety tests. A Washington State Patrolman then arrived and, after further testing, arrested defendant for driving under the influence of an intoxicating liquor. Id. at 1333-34.

On appeal, the Washington Supreme Court addressed whether "an Indian tribal officer [had] the inherent authority to stop a non-Indian driving a motor vehicle on a public road within the reservation to investigate a possible violation of tribal law . . . ." Id. at 1335. The court also examined whether this tribal officer had the authority to subsequently detain the non-Indian, "until he or she

[could] be turned over to state authorities for charging and prosecution." Id.

The Schmuck court concluded that the tribal officer had the legal authority to stop and detain the defendant. In so finding, the court explained:

> [F]undamental to enforcing any traffic code is the authority by tribal officers to stop vehicles violating that code on roads within a reservation. In this case, Officer Bailey was exercising the Tribe's authority to enforce its traffic code when he observed the speeding pickup truck and pursued it through the streets of the Reservation. When he first saw the truck, he had no means of ascertaining whether the driver was an Indian. Only by stopping the vehicle could he determine whether the driver was a tribal member, subject to the jurisdiction of the Tribe's traffic code. The alternative would put tribal officers in the impossible position of being unable to stop any driver for fear they would make an unlawful stop of a non-Indian. Such a result would seriously undermine the Tribe's ability to enforce tribal law and would render the traffic code virtually meaningless.

Id. at 1337.

The core problem in Schmuck is also present here -- namely, because of the jurisdictional overlap on reservation territory, a law enforcement officer will not know whether he has jurisdiction over an individual until he can stop that person and determine his identity. The Schmuck court came to the commonsense conclusion that, because of this ambiguity, the law enforcement officer must at least be vested with the authority to stop an individual to determine jurisdiction. The government suggests that, under Schmuck, the state officer, like the tribal officer, should have the authority to make this preliminary inquiry.

Schmuck emphasized the Suquamish Tribe's sovereignty interest in regulating the conduct of its members within its borders. Likewise, state and local officers have a sovereignty interest in regulating the conduct of non-tribal members passing over public highways. See, e.g., State v. Webster, 338 N.W. 2d 474 (Wis. 1983). Indeed, the parties agree that these officers have the sole authority to prosecute non-tribal members violating traffic laws on these highways, even in reservation territory. The court agrees with the Schmuck's reasoning that a sovereignty interest such as this cannot be meaningfully protected unless officers have stop and detain authority over all individuals, including those over which they lack jurisdiction.

The court does not believe that allowing state and local officers stop and detain authority on public highways impermissibly encroaches upon tribal

sovereignty. Recent Supreme Court cases have limited the extent of tribal sovereignty. See, e.g., Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (inherent sovereignty of the Indian tribes does not extend to criminal jurisdiction over non-Indians who commit crimes on the reservation); Duro v. Reina, 495 U.S. 685 (1990) (Oliphant holding also applies to Indians that are not members of the tribe on whose reservation an alleged crime was committed). The Court best explained the nature of tribal sovereignty in Duro:

> A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens. Oliphant recognized that the tribes can no longer be described as sovereigns in this sense. Rather, as our discussion in Wheeler reveals, the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order. The power of a tribe to prescribe and enforce rules of conduct for its own members does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations

between an Indian tribe and nonmembers of the tribe.

Duro, 495 U.S. at 685-86 (citations and quotations omitted).

This passage makes clear that tribal sovereignty is necessarily limited. Congress has created a jurisdictional patchwork to govern matters occurring on Indian reservations. This patchwork arrangement combined with the geographical reality that public highways patrolled by state and local officers often pass through reservation lands, dictate, as a practice matter, that nontribal officers will often be in Indian Country. These nontribal officers have the authority to cite or arrest nontribal members violating laws in Indian Country. Under these circumstances, the court agrees with the government that these state and local officers should also be vested with the authority to stop and detain individuals in Indian Country to determine whether they have jurisdiction over them.

Defendant contends alternatively that Deputy Schwab lacked the legal authority to pull over, pursue, and, ultimately, arrest him because Deputy Schwab specifically knew defendant to be a tribal member. The Magistrate Judge disagreed, finding that Deputy Schwab did not know that defendant was a Native American until CRIT identified him as such after the altercation.[2]

---

[2] At oral argument, defense counsel suggested that the Magistrate Judge made no finding regarding whether Deputy

The court reviews the Magistrate Judge's factual finding for abuse of discretion. Defendant relies on several pieces of indirect evidence in suggesting that Deputy Schwab must have known that he was a Native American before the altercation: (1) Mr. Schwab had lived on the reservation since 1969 and knew defendant's brother and sister; (2) Mr. Schwab and defendant, and their families, attended the same schools; (3) Mr. Schwab formerly worked for the Colorado River Tribal Police department (who brought prisoners to the tribal court) at the same time defendant was serving as a tribal judge; (4) Mr. Schwab was familiar

---

Schwab knew of defendant's tribal membership. Yet, as the government pointed out in response, the Magistrate Judge stated:

> Moreover, the Court does not find that there is anything that occurred that would be subject to suppression under the Constitution, and that all the events, as far as seeing the individual, other than the final identification of him as an Indian, which was really supplied by Raymond Evans, all occurred during the -- prior to any touching of Mr. Patch by Office[r] Schwab, the deputy sheriff, and therefore was properly done.

(Reporter's Transcript, 1/11/95, p. 30.) The court interprets this passage to signify that, in the Magistrate Judge's view, defendant's identity (as a tribal member) was unknown until Raymond Evans made the identification.

with the residence where the altercation occurred because he had picked up and dropped off the defendant's sister, Mara Patch, at the residence when they worked together for the same CRIT police agency; (5) defendant was a tribal counselperson at the time of the altercation; (6) defendant and his sister resembled in appearance Native Americans; (7) Mr. Schwab's radio transmissions indicate that he was aware he was possibly following a tribal member; and (8) Mr. Schwab allegedly told Ray Evans of CRIT that he knew defendant was a Native American when defendant exited his car at his sister's home.

At trial, the government provided evidence suggesting that Deputy Schwab did not know of defendant's tribal membership before the altercation. Most to the point, Deputy Schwab testified that he did not ever recall coming across the defendant before May 28, 1994. As to the two attending the same schools, the government notes that defendant conceded that he went to school with Deputy Schwab's older brothers rather than Deputy Schwab. Although defendant argues that, as a CRIT police employee, Deputy Schwab "would have brought prisoners to the tribal court at the same time Mr. Patch was serving as a tribal judge," neither the defendant nor Deputy Schwab could recall Deputy Schwab ever appearing in defendant's courtroom. Deputy Schwab also testified that he did not know defendant was a tribal judge during the time he was working for the tribal police.

As to defendant's claim that Deputy Schwab should have recognized defendant

to be Native American by his physical appearance, the government has directed the court to evidence in the record suggesting the difficulty law officers have in determining tribal membership based only on appearance. Specifically, non-CRIT Native Americans and hispanics bearing strong physical resemblance to the CRIT members also frequent the area.

Defendant believes that Deputy Schwab's statements preceding and following the altercation evince his prior knowledge that defendant was a tribal member. He relies on three statements: (1) Deputy Schwab's radio transmission describing the occupant of the truck he was pursuing as a "possible tribal member," (2) Deputy Schwab's directive to the other officers upon arriving at defendant's sister's home to call CRIT, and (3) Deputy Schwab's statement to Raymond Evans of CRIT that defendant was an Indian.

Deputy Schwab's first two statements do not support defendant's position. With these statements, Deputy Schwab merely acknowledged that he was possibly following tribal members. It was not at all unreasonable for him to recognize that possibility, given that his pursuit was taking him into the reservation. Awareness of this possibility, however, does not demonstrate that he knew defendant was a tribal member during the pursuit or at defendant's sister's home.

Officer Evans' testimony more directly suggests that Deputy Schwab knew defendant was a tribal member before the altercation. However, Deputy Schwab directly contradicted this testimony by

testifying that he only knew that defendant was a tribal member after the altercation. The Magistrate Judge was best situated to weigh the credibility of these two witnesses. The court further notes that, even according to Officer Evans, Deputy Schwab only stated that he knew defendant was an "Indian" when he exited the car, not that he knew defendant was a CRIT member. Deputy Schwab has testified that "there [are] a lot of people that are not tribal members that are just from other nations, Indian nations, that come to the reservation." (Tribal Transcript 1/10/95 at 153.) Thus, even Officer Evans' testimony does not conclusively establish that Deputy Schwab knew defendant was an individual over whom he did not have jurisdiction when the altercation occurred.

The court concludes that the Magistrate Judge did not abuse his discretion by finding that Deputy Schwab did not know whether defendant was a CRIT member until after the altercation. Deputy Schwab directly testified that he did not know this. Neither defendant nor any other witness testifying on defendant's behalf could directly aver that Deputy Schwab in fact previously knew that defendant was a tribal member. Defendant has attempted to make up for this shortcoming by providing several pieces of indirect evidence suggesting that Deputy Schwab knew the defendant. The Magistrate Judge did not abuse his discretion by accepting the government's rejoinders to this indirect evidence. Nor did he abuse his discretion by finding Deputy Schwab's direct testimony on the matter most persuasive.

Defendant suggests that whether or not Deputy Schwab had the authority to originally pursue him on Highway 95, he had no continuing authority to pursue him off the public highway to a tribal member's residence. The court agrees with the government, however, that if an officer lawfully begins a pursuit he has the right to continue this pursuit to locations on which he would not otherwise be authorized, if he is in "hot pursuit" of an individual not complying with his duties. See Ross v. Neff, 905 F.2d 1349, 154 n. 6 (stating that although a non-tribal officer does not have jurisdiction to arrest Native Americans in Indian country, this holding does not "cast doubt upon the constitutional validity of extra-jurisdictional arrests made by police officers in 'hot pursuit.'"0. Cf. State v. Lupe, 889 P.2d 4 (Ariz. Ct. App. 1994) (non-tribal officer's pursuit of a Native American from off the reservation on to the reservation was lawful); State v. Herber, 598 P.2d 1033 (Ariz. Ct. App. 1979) (non-tribal officer's pursuit of a non-Native American from off the reservation onto the reservation was lawful).

Defendant contends that Deputy Schwab should have waited outside the residence until the Colorado River Indian Tribal police arrived, instead of immediately arresting him. However, defendant again presupposes that Deputy Schwab knew that he was a tribal member. As noted above, the Magistrate Judge determined that Deputy Schwab did not know this until defendant was identified as such by the CRIT police after the altercation. Moreover, the record suggests that Deputy Schwab gave

defendant ample opportunity to defuse the situation by identifying himself as a tribal member. Given defendant's failure to do this, Deputy Schwab was justified in attempting to detain defendant by grasping his arm. In sum, there was ample evidence in the record to support the Magistrate Judge's conclusion that Deputy Schwab acted within his authority in pursuing and subsequently arresting defendant.

C. Whether Defendant's Good Faith Belief that Deputy Schwab Did Not Have the Legal Authority to Arrest Him Requires Reversal

Defendant finally contends that he resisted Deputy Schwab with the good faith belief that Deputy Schwab did not have the legal authority to arrest him. He suggests that this good faith belief operates as a defense to his alleged assault on Deputy Schwab. United States v. Span, 970 F.2d 573, 5809 (9th Cir. 1992), cert. denied, 507 U.S. 921 (1993), teaches otherwise. In Span, the court explicitly delineates the circumstances under which an individual can resist an arrest:

> At most, [United States v.] Moore, [483 F.2d 1361 (9th Cir. 1973)] stands for the rule that an individual has a limited right to offer reasonable resistance to an arrest that is the product of an officer's personal frolic. Moore, 483 F.2d at 1364-65. That right is not triggered by the absence of probably cause, but rather by

> the officer's bad faith or provocative conduct.

Id. at 580. Hence, a defendant can only offer resistance to an arrest if the officer is acting in bad faith in attempting to make the arrest. Here, as detailed above, the evidence in the record clearly demonstrates that Deputy Schwab acted in good faith in pursuing and attempting to detain defendant. Accordingly, under Span, defendant had no legal right to offer resistance.[3]

The Magistrate Judge's finding of conviction and entry of sentence is AFFIRMED.

---

[3] Defendant's cases are not to the contrary. They suggest that a defendant has not acted "willfully" (as that term is used in other statutes) if he has a good faith belief that he is not violating the law. Defendant suggests that he did not act willfully in this instance because he had a good faith belief that Deputy Schwab was acting beyond his jurisdictional authority in pursuing him. Yet, under Span, defendant would still be violating the law by resisting arrest unless he had a good faith belief that Deputy Schwab was acting in "bad faith" by arresting him. Defendant does not allege this. Accordingly, his assault was willful.

DATED this 15th day of April, 1996.

s/ Robert C. Broomfield

Robert C. Broomfield
United States District
Judge

Copies to counsel of record

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

UNITED STATES OF AMERICA **JUDGMENT IN A CRIMINAL CASE**
v.
RAYFORD HANSON PATCH Case Number:
SSN: CR 94-241 PCT MS
DOB:
5892 Del Sol Bruce Feder,
Big River, CA retained
Attorney for
Defendant

THERE WAS A:
[☒finding ☐verdict] of guilty as to count(s) the Information, Class B misdemeanor
[☐finding ☐verdict] of not guilty as to count(s) _____
☐judgment of acquittal as to count(s)

_____
The defendant is acquitted and discharged as to this/these count(s)

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Title 18, United States Code, Sections 113(e) and 1152, Simple Assault, a Class B misdemeanor

IT IS THE JUDGMENT OF THIS COURT THAT:
Defendant is fined in the amount of $150.00 which shall be paid within thirty (30) days and defendant shall pay a special assessment of $10.00.

In addition to any conditions of probation/ supervised release imposed above, IT IS ORDERED that the conditions

of probation/ supervised release set out in the remainder of this judgment are imposed.

CONDITIONS OF PROBATION/SUPERVISED RELEASE

Where probation has been ordered the defendant shall:

[1] refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

[2] associate only with law-abiding persons and maintain reasonable hours;

[3] work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work, notify your probation officer at once and consult him prior to job changes);

[4] not leave the judicial district without the permission of your probation officer;

[5] notify your probation officer immediately of any changes in your place of residence;

[6] follow your probation officer's instructions, report as directed, and comply with any general or special conditions pursuant to District of Arizona General Order 201.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant

and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

IT IS FURTHER ORDERED that the defendant shall immediately pay to the Clerk of the Court a total special assessment of $10.00 pursuant to Tiel 18, U.S.C. Section 3013 for count(s) the Information as follows:

IT IS FURTHER ORDERED that counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States Attorney for this district any amount imposed as restitution. The defendant shall pay to the Clerk of the Court any amount imposed as a fine and as a cost of prosecution. Payment of such amount is due immediately but, if so ordered shall be payable in equal monthly installments with payment in full by a date certain. In all cases restitution, fines, and costs shall be payable during the period of incarceration with the payment of any remaining balance to be a condition of probation or supervised release. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the United States Attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the Clerk of the Court deliver a certified copy of this judgment to the United States Marshal of this district.

☐ The Court orders commitment to the custody of the Bureau of Prisons and recommends:

January 24, 1995
Date of Imposition of Sentence

s/ Morton Sitver
Signature of Judicial Officer
MORTON SITVER
United States Magistrate Judge
Name and Title of Judicial Officer

January 24, 1995
Date

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____

to _____

at _____,

the institution designated by the Bureau of Prisons, with a certified copy of this Judgment in a Criminal case.

_____

United States Marshal

By _____

Deputy Marshal